

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc.)	
Against New England Telephone and Telegraph)	
Company, d/b/a Bell Atlantic-Massachusetts)	D.T.E. 97-116
)	

Complaint of Global NAPs, Inc.)	
Against New England Telephone and Telegraph)	
Company, d/b/a Bell Atlantic-Massachusetts)	D.T.E. 99-39
)	

**REPLY OF VERIZON MASSACHUSETTS TO JOINT MOTION OF
GLOBAL NAPs, INC. AND MCI WORLD COM COMMUNICATIONS, INC. TO
AMEND PROCEDURAL SCHEDULE AND EXTEND THE TIME FOR FILING**

The Department should deny the Motion to Amend Procedural Schedule and Extension of Time filed by WorldCom and Global NAPs on November 5, 2002. Their claim that the Department should not proceed to address the District Court's remand in accordance with schedule set in the October 24, 2002 Procedural Schedule is both: (1) an untimely and procedurally defective "appeal" from a ruling of the Hearing Officer; and (2) substantively without merit. Accordingly, the Department should deny the Motion and proceed with the remand as set forth in the Procedural Ruling.

This proceeding arises from Department orders relating to whether the interconnection agreements between Verizon MA and the Movants require the payment of reciprocal compensation for Internet-bound traffic. Procedural Ruling at 1. The Movants appealed the Department's orders to the United States District Court for the District of Massachusetts (the

“District Court”), which issued its decision on August 27, 2002. *Global NAPs et al. v. Verizon, et al.*, Consolidated Civil Actions, Nos. 00-10407-RCL and 00-11513-RCL (D. Mass. August 27, 2002). As the Department stated in the Procedural Schedule, the District Court remanded the above-referenced cases to the Department to “‘consider the contractual language in the parties’ interconnection agreements’ in accordance with the District Court’s August 27, 2002 decision.” *Id.* at 2. Consistent with the District Court’s instructions that the Department engage in “proceedings or deliberations,” the Department established the following briefing schedule: Initial Briefs to be filed on November 8, 2002 and Reply Briefs to be filed on November 15, 2002. *Id.*

In the Procedural Ruling, the Department noted that it had filed with the United States Court of Appeals for the First Circuit a notice of appeal of the District Court’s decision and that it would “shortly file a motion for stay of the District Court’s decision.” *Id.* The Movants urge the Department to suspend the briefing schedule until “two weeks after disposition on the motion for stay...” (Motion at 2).¹ The Movants’ sole ground for seeking delay is that they don’t wish to incur the “expense of briefing for a proceeding that the Department evidently thinks it should not have to undertake” (*id.* at 1-2).

The Department should deny the Motion. First, the Motion should be rejected on procedural grounds, alone. The Procedural Ruling was issued by the Hearing Officer on October 24, 2002, and the Motion is an untimely appeal from that ruling. Under Department regulations, parties wishing to challenge a ruling or decision of a Hearing Officer are required “immediately” to notify the Hearing Officer of the intent to appeal so that the Hearing Officer can establish a schedule for the submittal of the appeal and responses by other parties. 220 C.M.R. 1.06(d)2.

¹ In the alternative, and without further explanation or showing of any good cause, the Movants request that initial briefs be due on December 2, 2002, with reply briefs filed a week thereafter.

The Movants failed to follow this procedure, but instead waited nearly two weeks to file – a mere three days before the date for the initial briefs.

More importantly, however, the Motion provides no substantive grounds for a delay. The Movants' position seems to be that because the Department is appealing the District Court's decision and plans to file for a stay, it should defer consideration. This position is tantamount to the Department granting *itself* a stay of its "continuing obligation to comply with the requirement" to proceed with the remand. Procedural Ruling at 2. Although the Department's appeal of the District Court's decision has merit, the Department may not simply disregard its obligations and refuse to move forward. The District Court's decision is effective unless and until a stay is granted (16A *Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* § 3954 (1999)), and the Department must move seasonably to comply with its remand obligation.²

GNAPs' arguments are also in stark contrast to the aggressive position it has taken in civil litigation. GNAPs has attempted to bypass the administrative review required by the Telecommunications Act of 1996 (the "Act"), the District Court's decision, and the plain terms of its interconnection agreement by filing suit in Massachusetts Superior Court to seek payment under the interconnection agreement. *See Global NAPS, Inc. v. New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts*, Civil Action No. 02-4211 (Suffolk

² It should also be noted that the courts impose a high standard for approval of a stay. The factors considered in granting the issuance of a stay in this type of circumstance generally include: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the applicant will be harmed irreparably absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill* 481 U.S. 770, 776 (1987); *Canterbury Liquors & Pantry v. Sullivan*, 999 F.Supp. 144, 149-150 (D. Mass. 1998); Fed.R.Civ.P. 62(c); Fed.R.App.P. 8(a). *See also Boston Edison Company*, D.P.U. 92-130-A, at 7 (1993). Thus, the granting of a stay is neither automatic nor routine.

Superior Court). Not only is that filing an inappropriate attempt at forum-shopping,³ but it uncovers a more nefarious litigation strategy: GNAPs would have the Department delay responding to the federal court's remand, while it seeks to convince a state court that it is entitled to be granted a windfall of tens of millions of dollars. It is disingenuous for GNAPs to complain of the "expense" of filing a 30 page brief – on issues that have been addressed extensively by the parties many times and in many jurisdictions – while it has decided to incur the expense of filing a frivolous law suit against Verizon MA designed to undermine the District Court's remand requirements and the Department's critical role under the Act.

As the Department stated in the Procedural Ruling, if a stay is granted, the Department's remand consideration can be stayed. Procedural Ruling at 2. However, until there is such an order from a federal court, the deferral of the schedule would place the Department in the position of not responding in a reasonable and appropriate manner to the express instructions of the District Court. The Department should not and cannot choose this course of action, and the Motion must be denied.

³ Verizon MA will move to dismiss the suit in Superior Court because jurisdiction properly lies with the Department.

WHEREFORE, Verizon MA respectfully requests that the Department deny WorldCom/GNAPs' motion.

Respectfully submitted,

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